

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209816

DATE May 17, 1983

MATTER OF: Northpoint Investors

DIGEST:

1. Acceptance of a prospective contractor's offer by the Government must be clear and unconditional, and contract does not arise when the purported acceptance by the contracting officer is conditioned on future actions by both offeror and procuring agency.
2. Where the Government no longer needs to lease additional office space, and where, even if additional space ultimately is needed, it can be obtained at a considerably lower rate than offeror's, contracting officer has reasonable basis to reject offer and cancel solicitation.
3. GAO will deny protest alleging that contracting officer's decision to cancel a solicitation in a negotiated procurement for office space was not independently made, as required by regulations, when protester has failed to show undue influence or that cancellation was motivated by fraud or bad faith.
4. Since minor procedural deviations on the part of an agency do not affect the legality of the action to which they relate, absent a showing of prejudice, GAO will deny protests based on such deviations.

Northpoint Investors protests the cancellation by the General Services Administration of solicitation No. GS-09B-79864 for a 10-year lease of approximately 36,000 square feet of office space in San Francisco, California. We deny the protest.

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In response to a request from the Internal Revenue Service for space in which to locate its San Francisco offices, GSA advertised in June and December 1980 but received no acceptable offers. Subsequently, upon learning that Northpoint had space available in an acceptable location, GSA issued a solicitation for offers to that firm. Northpoint submitted an initial offer on December 17, 1981. After lengthy negotiations, a proposed lease was sent to GSA's Office of Contract Clearance in Washington, D.C. on August 4, 1982. This office, however, disapproved the recommended award, and on October 27, 1982, the contracting officer canceled the solicitation.

Northpoint alleges that a contract arose because the contracting officer, in a letter dated June 23, 1982, stated:

"We are forwarding the enclosed lease which embodies your offer of May 13 as revised June 14 and June 16 * * * Paragraph 10 of the lease reflects our counter-offer for payment of overtime utilities service."

The contracting officer asked Northpoint to review the enclosed lease and sign and return both the original and a copy. Northpoint executed and returned the required documents, thereby allegedly accepting GSA's counter-offer. Northpoint contends that cancellation of the solicitation constitutes a breach of contract by the Government.

We find that the contracting officer did not accept Northpoint's offer of May 13 in the June 23 letter. The acceptance of a prospective contractor's offer by the Government must be clear and unconditional; it must appear that both parties intended to make a binding agreement at the time of the purported acceptance. Marino Construction Company, Inc., 61 Comp. Gen. 269 (1982), 82-1 CPD 167.

Any acceptance here was conditioned upon future actions by the Government, since the June 23 letter stated:

"We are assuming a July 15 award with an anticipated effective date of January 15, 1983 * * *. After execution by the Government the copy will be returned to you." (Emphasis added.)

The purported acceptance here was neither clear nor unconditional.

Therefore, despite the contracting officer's use of the phrase "our counter-offer" with regard to over-time utilities service, Northpoint's acceptance would not have created a contract. Under general principles of contract law, a manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude the bargain until he has made a further manifestation of assent. Restatement (2d) of Contracts § 26 (1981). Northpoint had reason to know from the use of the conditional future language that the contracting officer did not intend to conclude a binding agreement until GSA had made a further manifestation of assent by means of an award and execution of the lease.

Northpoint also argues that there was no compelling reason to cancel the solicitation. We have previously held that in negotiated procurements, the contracting officer needs only a reasonable basis for cancellation, as opposed to the "cogent and compelling" reasons required for the cancellation of formally advertised solicitations after bid opening. This distinction is based on the anti-competitive effect of the public disclosure of bids that takes place in advertised but not in negotiated procurements. Allied Repair Services, Inc., B-207629, December 16, 1982, 62 Comp. Gen. ___, 82-2 CPD 541.

We have upheld an agency's cancellation of a solicitation in a negotiated procurement where the goods or services covered by the solicitation were no longer required, A. B. Machine Works, Inc., B-187563, September 7, 1977, 77-2 CPD 177, or where substantial cost savings could accrue to the Government as a result of the cancellation. Science Information Services, Inc., B-205899, June 2, 1982, 82-1 CPD 520. In this case, GSA indicates that it may be able to accommodate the Internal Revenue Service's request for office space in space already leased by the Government. Even if additional

space ultimately is required, GSA indicates that, as a result of changes in the market in San Francisco, it now can be obtained at a considerably lower rate than the \$35 a square foot offered by Northpoint. We believe these circumstances provide a reasonable basis for cancellation of the solicitation issued to Northpoint.

Northpoint has made a number of other allegations that we find without legal merit. The firm alleges that the decision to cancel the solicitation was not the independent decision of the contracting officer, but instead the result of influence exerted by the contracting officer's superiors. We assume Northpoint is referring to the need for approval of the lease by GSA's Office of Contract Clearance. Since Northpoint has failed to present any evidence of undue influence or to show that the cancellation was improperly motivated, i.e., by fraud or bad faith, we find it has not met its burden of proof on this point.

Northpoint further alleges that the contracting officer failed to notify it of the reasons for the rejection of its offer, as required by Federal Procurement Regulations (FPR) 1-2.404-3 (1964 ed.). However, the conduct of negotiations for the lease of real property is not subject to these regulations. See FPR § 1-1.004-1 (amend. 141, March 1975). Admittedly, the principles inherent in the competitive procurement system should be applied to such leasing. GSA has promulgated a handbook, "Acquisition of Leasehold Interests in Real Property," Public Buildings Service 1600.1a, January 1981, and we have relied on these standards, rather than on the FPR, where necessary to resolve protests over negotiations for the lease of real property. 51 Comp. Gen. 565 (1972).

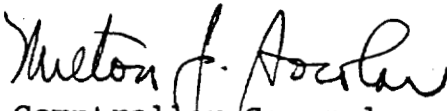
In any event, we regard this failure to notify as a minor procedural deviation on the part of the agency, of the type that does not affect the legality of agency actions absent a showing of prejudice. See Liquid Controls Corp., B-208257, December 7, 1982, 82-2 CPD 512; B-170705, November 23, 1970. At the very least, Northpoint has received notice, by means of GSA's response to this protest, of the reasons for rejection of its bid and

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cancellation of the solicitation. Since Northpoint has failed to show how it was prejudiced by lack of prior notice, the legality of the cancellation is not affected.

Nor do we find the validity of the award affected because GSA allegedly violated its own handbook by failing to satisfy the Internal Revenue Service's request for office space within 120 days of receipt. Any such failure is also a procedural deviation from guidance that, in our opinion, is for the benefit of the Government, not prospective lessors.

The protest is denied.

for 
Comptroller General
of the United States